2004

Kenneth Rasmussen v. Neal G. Davis : Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

KENNETH RASMUSSEN and
FAUN RASMUSSEN,
Plaintiffs and Appellants,

— vs. —

NEAL G. DAVIS and DORA S.
DAVIS,
Defendants and Respondents.

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

ELIAS HANSEN
DON MACK DALTON
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KENNETH RASMUSSEN and
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— vs. —

NEAL G. DAVIS and DORA S.
DAVIS,
Defendants and Respondents.

No. 4218

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF UTAH:

Come now the plaintiffs and appellants in the above entitled cause and respectfully petition this court to

grant a rehearing in the above entitled cause upon the following grounds:

1. That the majority opinion of this court is in error in holding that all question of the forfeiture of the rights of the plaintiffs and appellants under the original contract between plaintiffs and defendants have become moot.

2. That the majority opinion of this court is in error by in effect holding that plaintiffs having consented to a rescission of a part of the original contract between plaintiffs and defendants are precluded from maintaining this action.

3. That the majority opinion of this court is in error in holding that plaintiffs have waived their right to rely on the error of the trial court in refusing to permit the defendant Faun Rasmussen to testify that the defendant Kenneth Rasmussen told her that when they vacated the property which they agreed to purchase, they were not releasing their right to part of the $8000.00 down payment.

4. That the majority opinion of this court is in error by in effect holding that Mrs. Rasmussen is precluded from claiming a part of the down payment of $8,000.00.

5. The majority opinion of this court is in error in holding that the plaintiffs did not establish a jury case as to deceit.

Respectfully submitted,

DON MACK DALTON
ELIAS HANSEN
Attorneys for Plaintiffs and Appellants.

STATE OF UTAH
COUNTY OF SALT LAKE } ss.

We, Don Mack Dalton and Elias Hansen, each hereby certify that the foregoing petition for a rehearing is not filed for the purpose of delay and that each of us is of the opinion that there is merit to the foregoing petition.

Respectfully submitted,

DON MACK DALTON
ELIAS HASEN
Attorneys for Plaintiffs and Appellants.

ARGUMENT

At the outset we find the authorities are all to the effect that before a contract can be rescinded, it is necessary that all of the parties must consent to the rescission

except, of course, a court may decree a rescission and the parties may abandon a contract.

So also the authorities are all to the effect that a contract may be rescinded or "terminated by virtue of a contractual provision therefor, and rescission for original invalidity, failure of consideration, material breach." Generally when a contract is rescinded there is a right of restitution. 12 Am. Jur., page 1010, Sec. 430, et seq. and cases cited in foot notes.

In this case the contract between the parties was rescinded if at all by the agreement of the parties. There is neither pleading nor evidence of any other rescission unless it be that defendants rescinded the contract because of a breach thereof by plaintiffs in failing to make the payment of the installment of $5000.00 which became due on January 1, 1952.

It is said in 12 Am. Jur. 1011 that

> "Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However to have the effect of discharging a contract an agreement of rescission must be a valid agreement. Two minds are required to change the terms and conditions of a contract after it is executed. As a contract is made by the joint will of two parties, it can be rescinded only by the joint will of two parties. It is obvious that one of the parties can no more rescind the contract without the others express or implied assent than he alone can make it."

The law just quoted is so elementary that we refrain from reviewing the numerous cases cited in the foot notes to the text, however, we have read a number of such cases and needless to say, they support the text. With these fundamental principles of law as a background, let us examine the holdings of the majority opinion of the court that we claim are erroneous.

POINT ONE AND POINT TWO

THE MAJORITY OPINION OF THIS COURT IS IN ERROR IN THAT IT IS HELD THAT: ALL QUESTIONS OF THE FORFEITURE OF THE RIGHTS OF THE PLAINTIFFS AND APPELLANTS UNDER THE ORIGINAL CONTRACT BETWEEN THE PLAINTIFFS AND DEFENDANTS HAVE BECOME MOOT, AND SUCH MAJORITY OPINION IS IN ERROR BY IN EFFECT HOLDING THAT PLAINTIFFS HAVE CONSENTED TO A RESCISSION OF A PART OF THE ORIGINAL CONTRACT BETWEEN PLAINTIFFS AND DEFENDANTS ARE PRECLUDED FROM MAINTAINING THIS ACTION.

The particulars in which appellants and plaintiffs claim the majority opinion of this court is in error as to the first and second grounds upon which they seek a rehearing are so similar and so interwoven that they can best be discussed together and therefore we shall so discuss them.

It is correctly stated in the dissenting opinion that the majority opinion is bottomed on the erroneous conception that the parties got together and made a so-called rescission of the entire agreement. The evidence is all

to the effect that plaintiff, Kenneth Rasmussen, and defendant, Neal G. Davis, were not able to agree upon what should be done about the down payment of $8000.00. If there is doubt about that being the testimony of both of the plaintiffs and appellants the attention of the court is directed to the following pages of the Transcript: 25-27, 42, 100, 112, 113, 117, 136, 138, 139, 141, 182-185. The evidence also shows that defendant, Neal G. Davis, repeatedly said "if you don't get off or if you stop this sale, it will cost you a lot more than $8000.00." (Tr. 112, 114).

It will be seen from the foregoing testimony that the plaintiff, Kenneth Rasmussen, not once but upon numerous occasions testified that while he and defendant, Neal G. Davis, agreed upon the rescission of the original contract between plaintiffs and defendants in a number of particulars, they could not and did not agree as to what should be done with the down payment of $8000.00. About that being the evidence, there would seem to be no possibility of any difference of opinion. The defendant, Neal G. Davis, and plaintiff, Kenneth Rasmussen, having been unable to agree upon what should be done with the $8000.00, it necessarily follows that resort must be had to some method of disposing of the question of what should be done with the $8000.00.

In the testimony of Mr. Rasmussen, above referred to, it is made clear not only that he did not and would not consent to defendants retaining all of the $8000.00 but he also testified that it was agreed that "We were

going to turn it to our lawyers to finish on this $8000.00." (Tr. 42). It by no means follows that because the defendant, Davis, refused to voluntarily return part of the $8,000.00 he was not willing to submit the matter to arbitration. If, as seems obvious, the provisions of the contract, Exhibit A, which authorizes the defendants to retain not only the down payment of $8000.00, but also the note and mortgage for $5000.00 in the event of any breach of the original contract, no matter how slight, is against public policy. Such provision is a much more glaring penalty than that condemned by the Court in the case of *Perkins et al v. Spencer,* 243 Pac. (2d) 446. It is inconceivable that the Davises could suffer a loss of $13000.00 because of any breach of the original contract dated March 15, 1951 or January 2, 1952 when the $5000.00 note and mortgage became due.

The law dealing with a state of facts such as are here present is thus stated in 11 Am. Jur. 256:

> "Whatever may be the law as to cases involving no question of illegality, it is very clear that the general rule as to the effect of a compromise can have no application where the claim involved therein was wholly based upon an unlawful as distinguished from merely insufficient consideration. This universal acknowledged rule is not based upon any appreciative regard for the party against whom the relief is sought, and who will be benefited by the refusal of the court to grant the same, but upon grounds of sound public policy. Any contract executed in consideration of a previous illegal one, or in compromise of differences

> growing out of it is generally speaking like that whereon it rests, illegal and incapable of being enforced."

The authorities go further and hold that unconscionable compromises will be relieved against by courts of equity. 11 Am. Jur. 278. Cases in support of that text will be found in foot notes. Needless to say a claim based upon a provision of a contract that is a penalty and as such unenforceable is a typical illegal claim. In the case of *Union Collection Co. v. Buckman,* 150 Cal. 159, 88 Pac. 708, cited in the foot note to the text above quoted will be found collected a number of cases and authorities from which it will be seen that the doctrine announced in the text is of general if not uniform application. While most of the cited cases deal with gambling contracts, the doctrine as will be seen from the authorities is not limited to such cases.

Under the principles announced in the foregoing authorities it may, to say the least, be doubted if, under the facts shown by the evidence in this case, the plaintiffs had consented to forego their right to have returned to them a part of the $8000.00, such a compromise would have been enforceable. In this case, as the evidence shows, the defendant, Davis, stated that he had a sale for the property and unless Mr. Rasmussen surrendered up the property, he would be sued and it would cost him more than the $8000.00 which had been paid down on the property. It will be seen from the text and the cases cited in support thereof in 11 Am. Jur. 278 that courts of

equity will grant relief against unconscionable compromises on the grounds of presumptive fraud even if there is no actual fraud. That being so for much stronger reasons are the plaintiffs in this case entitled to relief where they at no time agreed to relinquish their claim to the $8000.00, the savings of a lifetime, as a part of the transaction whereby the contract was terminated.

It certainly is as much against public policy to make it possible to retain a penalty by threats as it is against public policy to seek unjust enrichment by contract.

POINT THREE

THE MAJORITY OPINION OF THIS COURT IS IN ERROR IN HOLDING THAT PLAINTIFFS HAVE WAIVED THEIR RIGHT TO RELY ON THE ERROR OF THE TRIAL COURT IN REFUSING TO PERMIT PLAINTIFF, FAUN RASMUSSEN, TO TESTIFY THAT THE DEFENDANT, KENNETH RASMUSSSEN, TOLD HER THAT WHEN THEY VACATED THE PROPERTY, WHICH THEY AGREED TO PURCHASE, THEY WERE NOT RELEASING THEIR RIGHT TO PART OF THE $8,000.00 DOWN PAYMENT.

The proceedings had before the court at the time the plaintiff, Faun Rasmussen, was asked the question as to the conversation had with her husband about what was to become of the $8000.00 down payment will be found on pages 182-185 of the Transcript. Mrs. Rasmussen was asked this question: "Was anything said by your husband as to the matter of the $8000.00?" (Tr. 182). A. "Yes Sir." The Court: "If there is no objection, I will let her testify, if there is, I won't."

At the suggestion of the Court, counsel for the defendant stated: "If I had any idea what her answer would be, I don't know whether we would object or not. We think it is incompetent." (Tr. 183).

The record further shows that the question of the admissibility of this proferred evidence was argued before the Court (R. 184). While the argument is not reported, the only reasonable conclusion is that the purposes for which the evidence was offered was presented to the court. There is no doubt but that the evidence is hearsay, and it is extremely unlikely that anyone would argue that the evidence was admissible for any other purpose than to show one of the facts that induced Mrs. Rasmussen to consent to vacate the premises. It is true that when, in the absence of the jury, counsel for plaintiffs stated what he proposed to show by the testimony of Mrs. Rasmussen, nothing further was said about the limited purpose for which such testimony was offered, but the Court having theretofore, in the argument had before him, been full advised as to the purpose of the evidence, it would have been idle to have again informed the court of the purpose of the offer where there could have been no other possible grounds upon which such evidence was competent.

It will further be noted that immediately following the ruling of the court, Mrs. Rasmussen testified that at no time at or prior to the time she moved off the Davis property did she have any information or know that the $8000.00 was to go to Mr. Davis. (Tr. 185).

It is said on page 2 of the opinion that no proffer was made under any exceptions to the hearsay rule and any error, therefore, was waived. In support of such holding there is cited Wigmore, Evidence Vol. 1 Sec. 18b, page 321. An examination of Wigmore on Evidence shows that the cited page must be in error because the subject matter referred to in the opinion is not there discussed. Section 18b does discuss the question of the waiver of errors in the rejection of evidence where the one offering the evidence does something thereafter which may be said to constitute a waiver. Under the old rules a failure to take exception to the ruling of the court constituted a waiver, but, of course, such rule has long since ceased to exist in this jurisdiction.

POINT FOUR

THAT THE MAJORITY OPINION OF THIS COURT IS IN ERROR BY IN EFFECT HOLDING THAT MRS. RASMUSSEN IS PRECLUDED FROM CLAIMING A PART OF THE DOWN PAYMENT OF $8000.00.

As will be seen from the statement of the law in 12 Am. Jur. Sec. 431, page 1011 and the cases there cited, the law is all to the effect that a contract cannot be rescinded without the express or implied assent of all of the parties thereto. So far as we are able to ascertain that is the uniform holding of the courts. In this case the evidence is all to the effect that Mrs. Rasmussen never consented to release any claim that she had to the $8000.00 down payment. She stated that she did not so consent.

Moreover, it is made apparent from the testimony of Mrs. Rasmussen that the defendant, Neal G. Davis, deliberately saw to it that Mrs. Rasmussen should not be informed of the terms upon which the original contract was terminated.

After the property had been returned to Mr. Davis, some men appeared at the Rasmussen home in Ephraim and called Mr. Rasmussen out of his home and there had a conversation with him about the terms upon which he agreed to surrender up the possession of the property. (Tr. 186, 187). About fifteen minutes after these men sought to secure admission from Mr. Rasmussen, they were seen in the presence of the defendant, Neal G. Davis. (Tr. 187). The only reasonable inference that can be drawn from that testimony is that Mr. Davis had at least grave doubts about being able to show that Mr. Rasmussen had agreed to surrender all interest in the $8000.00 and that he did not want Mrs. Rasmussen to know anything about the terms of the deal that defendant, Neal G. Davis, claims to have made with Mr. Rasmussen touching the surrender of the possession of the property that plaintiffs had agreed to purchase.

In the light of this behaviour of the defendant, Neal G. Davis, together with the uncontradicted evidence, it is quite apparent that if the majority opinion of this court is permitted to become the established law of this case, Mrs. Rasmussen will be deprived of her interest in the contract and particularly the $8000.00 without her consent and against her will. To so hold requires turning

the clock back for two or more centuries. If, in this case, the dealing had with Mr. Rasmussen had been had with Mrs. Rasmussen, we believe no one would contend that Mrs. Rasmussen would be bound by such dealings. As we understand the modern law in this jurisdiction, a husband has no greater right to dispose of the property rights of his wife than does a wife have to dispose of the rights of the husband. Certainly so far as Mrs. Rasmussen is concerned the defendant, Neal G. Davis, is seeking to rescind or terminate the original contract without the consent and against the will of Mrs. Rasmussen. That being so, the rights of the parties should be determined by the general law applicable to the rescission of contracts, namely, the parties should, so far as may be placed in status quo.

POINT FIVE

THE MAJORITY OPINION OF THIS COURT IS IN ERROR IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS DID NOT ESTABLISH A JURY CASE IN DECEIT.

It is true that the plaintiffs did not produce testimony as to the extent of the damages sustained by them because of the false representation of the defendant, Neal G. Davis during the negotiations leading up to the execution of the contract. To have done so would have been of no avail. It will be seen at the beginning of the trial that defendants so contended. (Tr. 3-4). Obviously the plaintiffs could not recover damages when by their plead-

ings they claim the contract was rescinded or cancelled. The authorities teach that when a contract is rescinded there can be no award of damages. 12 Am. Jur. Sec. 455, page 1038 and cases there cited.

However, the fact that the defendants falsely misrepresented the facts is material to show that the plaintiffs acted in good faith in seeking some redress for the wrong perpetrated upon them, that is sought a cancellation of the contract. That false statements were made by the defendants in the course of the negotiations which led up to the execution of the contract is amply borne out by the testimony. (Tr. 8, 15, 18, 177).

CONCLUSION

In conclusion plaintiffs urge that a rehearing of this cause be granted to the end that:

(a) This Court determine that the provisions of the original contract providing for the forfeiture of the down payment of $8000.00 and the note secured by a Chattel Mortgage for the sum of $5000.00 payable on January 2, 1952 be declared invalid because of an unconscionable penalty and that such provision was not and could not be rendered valid and binding upon the plaintiffs under the facts disclosed by the record in this case.

(b) That plaintiff, Mrs. Rasmussen, was not and could not be deprived of her interest in the $8000.00 down payment without her knowledge or consent and grevious

error was committed by the majority opinion of this court in holding that she has been deprived of such right.

(c) That the court re-examine the record in this case in light of the authorities cited herein and particularly from the point of view that the conversations had by the plaintiff, Mr. Rasmussen, and Mr. Davis did not and could not lawfully constitute a ratification of the provision in the original contract that the defendants might retain the $8000.00 down payment as liquidated damages and particularly as to the right of the plaintiff, Faun Rasmussen.

Respectfully submitted,

DON MACK DALTON
ELIAS HANSEN

Attorneys for Plaintiffs and Appellants.